APPEAL NO. 990021

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on December 2, 1998. She (hearing officer) determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBS) for the seventh quarter. The claimant appeals this determination, expressing his disagreement with it. The appeals file contains no response from the respondent (carrier).

DECISION

Affirmed.

The claimant sustained a compensable back injury on _____, as a result of which he underwent a lumbar fusion from L3 to the sacrum, with hardware, in a series of four operations. The process of approving another operation to remove the hardware was apparently underway at the time of the CCH. The claimant's impairment rating is greater than 15%.

Sections 408.142 and 408.143 provide that an employee continues to be entitled to SIBS after the first compensable quarter if the employee: (1) has not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment and (2) has in good faith sought employment commensurate with his or her ability to work. Pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(b) (Rule 130.102(b)), the quarterly entitlement to SIBS is determined prospectively and depends on whether the employee meets the criteria during the prior quarter or "filing period." Under Rule 130.101, "filing period" is defined as "[a] period of at least 90 days during which the employee's actual and offered wages, if any, are reviewed to determine entitlement to, and amount of, [SIBS]." The seventh SIBS quarter was from August 28 to November 26, 1998, and the filing period for this quarter was from May 30 to August 27, 1998.

At issue in this case was whether the claimant made the required good faith job search commensurate with his ability to work during the filing period. He testified that he made no job search efforts at all because, pursuant to the opinion of Dr. S, his surgeon, he was unable to work at all pending removal of the hardware and Dr. S told him that it was unlikely that anyone would hire him. The claimant also stated that he is limited to lifting no more than 10 pounds, cannot bend over "completely," and has trouble walking. He said he takes muscle relaxers and pain medication on a daily basis. A videotape of the claimant admitted into evidence showed him on two days near the end of the filing period walking, bending, carrying and climbing a ladder, washing a car, and driving. The claimant admitted it was him depicted on the videotape and explained his actions as being on a "good day."

The Appeals Panel has held in Texas Workers' Compensation Commission Appeal No. 931147, decided February 3, 1994, that if an employee established that he or she has no ability to work at all, then seeking employment in good faith commensurate with this

inability to work "would be not to seek work at all." Under these circumstances, a good faith job search is "equivalent to no job search at all." Texas Workers' Compensation Commission Appeal No. 950581, decided May 30, 1995. The burden of establishing no ability to work at all is "firmly on the claimant," Texas Workers' Compensation Commission Appeal No. 941382, decided November 28, 1994, and we have also stressed the need for medical evidence to affirmatively show an inability to work. Texas Workers' Compensation Commission Appeal No. 960123, decided March 4, 1996. *See also* Texas Workers' Compensation Commission Appeal No. 941332, decided November 17, 1994. A claimed inability to work is to be "judged against employment generally, not just the previous job where the injury occurred." Texas Workers' Compensation Commission Appeal No. 941334, decided November 18, 1994. The absence of a doctor's release to return to work does not in itself relieve the injured worker of the good faith requirement to look for employment, but may be subject to varying inferences. Appeal No. 941382, *supra*. Whether a claimant has no ability to work at all is essentially a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 941154, decided October 10, 1994.

The medical evidence introduced by the claimant to establish an inability to work consisted of two letters from Dr. S. On August 10, 1998, Dr. S wrote that the claimant "requires bed rest" and "cannot perform any activity which requires pushing, pulling, stooping, bending, crawling, squatting or climbing" because these activities "aggravate his lumbar condition." Dr. S further stated that the claimant was "not a candidate for gainful employment." Dr. S essentially restated this opinion in a letter of September 28, 1998.

The carrier introduced the opinions of three doctors on the issue of the claimant's ability to work. Dr. L examined the claimant on July 2, 1998. He found the fusion solid and commented that there "is no contraindication to [claimant] returning to work based upon objective criteria as [claimant's] back is solidly fused." On August 20, 1998, Dr. C examined the claimant. He concluded that he was not a candidate for further surgery and commented that the claimant "probably would be employable at a sedentary to light duty level." On July 27, 1998, Dr. CR also examined the claimant for an opinion on surgery and concluded that the fusion was solid with no indication that he could not return to work.

As noted above, whether the claimant had some ability to work during the filing period was a question of fact for the hearing officer to decide. The evidence was in obvious conflict with only Dr. S expressing this limitation. The hearing officer, as fact finder and sole judge of the weight and credibility of the evidence, found the opinions of the other three doctors more credible on this issue and the videotape more consistent with a conclusion that the claimant could, rather than could not, perform some work. The fact that the claimant would eventually opt for later surgery to remove hardware at some unspecified time in the future does not compel a conclusion that he was not able to work at all during the filing period for seventh quarter SIBS. We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this

standard of review to the record of this case, we find the opinions of Dr. L, Dr. C, and Dr. CR deemed credible and persuasive by the hearing officer, sufficient to support her determination that the claimant had some ability to work during the filing period for seventh quarter SIBS. Because by his own admission he did not look for work commensurate with this ability to work, he was not entitled to seventh quarter SIBS.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

_____
Alan C. Ernst
Appeals Judge

CONCUR:

_____
Susan M. Kelley
Appeals Judge

_____
Philip F. O'Neill
Appeals Judge